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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-649

CHARLES REYNOLDS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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NO. _____

CHARLES REYNOLDS,

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v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Charles Reynolds prays that a writ of certiorari issue to review the judgment (per curiam opinion and order and decree) of the Supreme Court of the State of Tennessee entered on July 16, 1973.

CITATION TO OPINIONS BELOW

The Criminal Court for Knox County, Tennessee did not render a written opinion. The opinion of the Court of Criminal Appeals for the State of Tennessee was filed

on September 11, 1972, and has not as of this date been reported in the official or unofficial reports. The per curiam opinion and order of the Supreme Court of the State of Tennessee was filed on July 16, 1973, and has not as of this date been reported in the official or unofficial reports. A copy of each of said opinions is appended hereto in the Appendix.

JURISDICTION

The judgment (per curiam opinion and order and decree) sought to be reviewed herein was rendered and entered on July 16, 1973. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

IS TENNESSEE CODE ANNOTATED, SECTION 39-1204 REPUGNANT TO AND IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND, FURTHER, WAS SAID STATUTORY PROVISION APPLIED TO THE PETITIONER, CHARLES REYNOLDS, IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First Amendment to the Constitution of the United States provide as follows:

> Congress shall make no law . . . abridging the freedom of speech . . .

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States provide as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated, Section 39-1204 provides as follows:

> 39-1204. *Disturbing Religious, Educational, Literary of Temperance Assemblies - Penalty.*-- If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other acts, at or near the place of meeting, he shall be fined not less than Twenty Dollars ($20.00) nor more than Two Hundred Dollars ($200.00), and may also be imprisoned not exceeding six (6) months in the County Jail.

STATEMENT

The petitioner, Charles Reynolds, was indicted on or about February 26, 1971, by the Grand Jury for Knox County, Tennessee, for violation of Tennessee Code Annotated, Section 39-1204 (T/R, 3) (references to the Technical Record before the Supreme Court of Tennessee will be designated as T/R, page, and references to the Bill of Exceptions before the Supreme Court of Tennessee will be designated as B/E, page.) The indictment in

question contained three counts. The first count, in essence, charged that the petitioner "willfully did disturb and disquiet an assemblage of persons met for religious worship by noise, profane discourse, rude and indecent behavior; that is to say, that the said defendant did unlawfully and willfully disturb and disquiet an assemblage of persons met for religious worship at the Billy Graham East Tennessee Crusade by noise, profane discourse, and rude and indecent behavior in violation of Tennessee Code Annotated, Section 39-1204, contrary to the statute and against the peace and dignity of the State of Tennessee". With respect to the second count of the indictment, the Court sustained the motion of the petitioner to quash said count (B/E, 10). At the conclusion of all the evidence, and before the Court's charge to the jury, the Court required the State to elect concerning upon which count the State desired to proceed, namely, the first or third counts of the indictment. The State elected to proceed upon the first count of the indictment referred to above (B/E, 513).

On September 30, 1971, the petitioner filed a motion to quash the indictment (T/R, 7-9) asserting two principal propositions: (1) the Grand Jury panel and precise Grand Jury which considered the indictment in this case did not contain a single individual or person who was under the age of 21 years but 18 years of age or older; (2) the statute in question, Tennessee Code Annotated, Section 39-1204, is unconstitutional and invalid and in violation of the pertinent provisions of the Constitution of the State of Tennessee and the Constitution of the United States. More specifically, the pertinent provisions of said motion to quash with regard to the federal question provided as follows:

> 4. The First Count of said Indictments and the statutory provision upon which they are based, namely,

Tenn. Code Ann. §39-1204 (1932), are unconstitutional and invalid and in violation of the Constitution of the State of Tennessee: Article I, §§9, 14, 19 and 23; and the Constitution of the United States: First, Fifth, Sixth and Fourteenth Amendments in that, (1) they are overbroad and, in addition, threaten freedoms protected by the First Amendment to the Constitution of the United States, and (2) are void for vagueness in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In addition, on the same date, September 30, 1971, the petitioner filed a motion for discovery seeking certain information from the Attorney General for Knox County, Tennessee (T/R, 10-11).

On October 11, 1971, the petitioner filed a motion to quash the trial jury panel predicated upon the same proposition as before, namely, that the trial jury panel did not contain thereon a single individual or person who was under the age of 21 years but 18 years of age or older (T/R, 12-13).

On October 11, 1971, all of the foregoing motions came on for argument. With respect to the motion for discovery, counsel for the petitioner conceded that the State had furnished them with all information to which they were entitled and, accordingly, said motion was dismissed. Following such arguments, the Court reserved its ruling on same until October 13, 1971, the scheduled trial date for this case (T/R, 14-15).

On October 13, 1971, prior to the commencement of the trial of this cause the Court issued its rulings with respect to the motions heretofore referred to. The motion to quash the trial jury panel was overruled. With respect to the motions to quash the indictment, said mo-

tion was sustained as to the second count of the indictment and overruled as to the first and third counts of the indictment (T/R, 16-17) (B/E, 4-18).

Thereupon, this matter came on for trial on October 13, 14, 15, 18 and 19, 1971, pursuant to the petitioner's plea of not guilty (T/R, 18), and after having heard all the evidence introduced in open court and the charge of the Court, the jury did return into open court on October 19, 1971, and render a verdict finding the petitioner guilty of a misdemeanor (Tennessee Code Annotated, Section 39-1204), as charged, and fixed the punishment at a fine of $20.00 (T/R, 22) (B/E, 531).

Immediately thereafter on October 19, 1971, a motion for new trial was entered (T/R, 22) (B/E, 531) and a motion for new trial was filed on October 29, 1971 (T/R, 23-28). More specifically, paragraphs 6, 9 and 10 of said motion for new trial provided as follows:

> 6. The Court erred in not granting the defendant's motion to quash the indictment predicated on the ground that the First Count of said indictment and the statutory provision upon which it was based, namely, *Tenn. Code Ann.* §39-1204 (1932), are unconstitutional and invalid and in violation of the Constitution of the United States: First, Fifth, Sixth and Fourteenth Amendments in that, (1) they are overbroad and, in addition, threaten freedoms protected by the First Amendment to the Constitution of the United States, and (2) are void for vagueness in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.
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> * * *
>
> 9. The Court erred in failing to direct a verdict upon the defendant's motion at the conclusion of the

State's proof because the State had failed to prove the necessary elements of the offense charged as to this defendant, namely, (1) willfulness, (2) that the meeting of persons on May 28, 1970, was an assemblage of persons met for religious worship, (3) that this defendant did disturb or disquiet any such assemblage, and (4) that the defendant engaged in noise, profane discourse or rude and indecent behavior. In addition, the Court erred in failing to hold *Tenn. Code Ann.* §39-1204 (1932), unconstitutional and invalid.

10. The Court erred in failing to direct a verdict upon the defendant's motion at the conclusion of all the proof because the State had failed to prove the necessary elements of the offense charged as to this defendant, namely, (1) willfulness, (2) that the meeting of persons on May 28, 1970, was an assemblage of persons met for religious worship, (3) that this defendant did disturb or disquiet any such assemblage, and (4) that the defendant engaged in noise, profane discourse or rude and indecent behavior. In addition, the Court erred in failing to hold *Tenn. Code Ann.* §39-1204 (1932), unconstitutional and invalid.

In addition, on November 12, 1971, the petitioner filed amendments to motion for new trial (T/R, 30-33). Said motion for new trial, and amendments thereto, were duly argued on November 12, 1971, and overruled by the Trial Court (T/R, 34). On November 12, 1971, following the action of the Court on the motion for new trial, the Trial Court entered judgment against the petitioner directing that he pay a fine in the amount of $20.00 plus costs. Thereafter, the petitioner excepted to the judgment of the Court and prayed an appeal to the next term of the Court of Criminal Appeals, which appeal the Court, Judge Joseph

D. Duncan, granted. The petitioner was required to file an appearance bond in the amount of $250.00 (T/R, 34).

On November 15, 1971, the petitioner filed tne necessary appearance bond (T/R, 35-36).

On March 28, 1972, the petitioner filed his Assignments of Error, Brief and Argument in the Court of Criminal Appeals for the State of Tennessee and therein presented the following Assignment of Error: "The Trial Court erred in failing to grant the Appellant's Motion to Quash the Indictment on Constitutional grounds." Said Assignment of Error was accompanied by a detailed brief and argument. On September 11, 1972, the Court of Criminal Appeals rendered its written opinion (Appendix, pp. A. 1-A. 11) affirming the judgment of the Trial Court.

On October 26, 1972, the petitioner filed a petition for writ of certiorari in the Supreme Court of Tennessee and therein presented the following Assignment of Error: "The Trial Court erred in failing to grant the Appellant's motion to quash the Indictment on Constitutional grounds." Said petition was accompanied by a detailed brief and argument. On July 16, 1973, the Supreme Court of Tennessee rendered a per curiam opinion and order and decree (Appendix, pp. A. 13-A. 15) discharging the petition for certiorari and remanding to the Court of Criminal Appeals for the carrying out of its judgment.

Oral argument was presented in the Court of Criminal Appeals and Supreme Court of Tennessee.

An appearance bond and stay order were duly filed in the Supreme Court of Tennessee on July 16, 1973, pending the filing of a petition for writ of certiorari in the Supreme Court of the United States.

With regard to the specific facts of the case, the petitioner herein, Charles Harlan Reynolds, is 32 years of age, married and has three children, and is an Assistant Professor in the Department of Religious Studies at the University of Tennessee. The school year 1971-1972 is Dr. Reynolds' third year of teaching at the University of Tennessee. His field of specialty within the Department of Religious Studies is Religious Ethics. Dr. Reynolds is a graduate of Birmingham Southern College, the Perkins School of Theology at Southern Methodist University and has a Ph.D. in the area of religion and society from Harvard University. In addition, Dr. Reynolds is also a minister in the Methodist Church. At the University of Tennessee, Dr. Reynolds teaches courses in the sociology of religion, religion and contemporary culture, and ethics which deals with ethical theory, medical ethics and theories of justice (B/E, 323-331).

The petitioner is charged with a violation of Tennessee Code Annotated, Section 39-1204, which provides as follows:

> If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of meeting, he shall be fined not less than Twenty Dollars ($20.00) nor more than Two Hundred Dollars ($200.00), and may also be imprisoned not exceeding six (6) months in the County Jail.

In the latter part of May, 1970, Dr. Billy Graham was conducting an East Tennessee Crusade in Neyland Stadium on the campus of the University of Tennessee. On May 28, 1970, President Nixon appeared and spoke at the even-

ing meeting of said Crusade. The petitioner and others were charged with a violation of the foregoing statute by engaging in certain alleged activity at the evening meeting of the East Tennessee Billy Graham Crusade which occurred on May 28, 1970, and at which time President Nixon appeared and spoke.

The trial of this matter involving the incident which allegedly occurred in Neyland Stadium on the University of Tennessee campus in Knoxville on May 28, 1970, took approximately five (5) days in October, 1971, during which the Court and jury heard the testimony of approximately 27 witnesses and considered the introduction of 23 exhibits. To analyze and present in detail in this Petition for Writ of Certiorari all of the testimony of each witness would require and present a rather protracted document in and of itself. Accordingly, it is felt by counsel that it would be more helpful and useful to the Court to present in summary form certain points and highlights which were brought out by the evidence introduced in this cause.

Dr. Reynolds learned that President Nixon was coming to the Billy Graham East Tennessee Crusade on the evening of May 28, 1970, on the day before, namely, May 27, 1970 (B/E, 331-332). The reaction of Dr. Reynolds to President Nixon's visit to Dr. Graham's Crusade was that such a visit had the possibility of creating a rather unfortunate reaction and situation, particularly with the recent events such as the Kent State and Jackson State occurrences and the invasion of Cambodia (B/E, 332). It was Dr. Reynolds' feeling that certain opposition to President Nixon's policies should be expressed, but that such expression should be conducted without violence. With this in mind, Dr. Reynolds held at least two meetings with Dr. Howard Aldmon, Vice Chancellor of the University of Tennessee, and others with a view to assuring that any such demon-

stration would be peaceful and with the hope that Dr. Aldmon would call out the faculty marshal corps in order to help to monitor any such demonstration (B/E, 333-337). A decision was subsequently made by Dr. Aldmon not to call out the faculty marshal corps since the Billy Graham East Tennessee Crusade was not technically a University of Tennessee function. In any event, plans were made to organize a demonstration in opposition to the policies of President Nixon. Dr. Reynolds felt that if such a proposed demonstration was not organized, there was a strong possibility that others who wanted to register their dissent might engage in acts of violence. Efforts were made concerning organization with a view to controlling and restricting any violence or improper actions. Dr. Reynolds at all times concentrated his efforts with a view to seeing that any such demonstration was at all times silent and peaceful.

On the afternoon of President Nixon's planned appearance at the Billy Graham East Tennessee Crusade, a rally was held in front of the University of Tennessee Student Center at which approximately 300 - 400 people attended, and during which several people spoke to the group assembled, among which were Dr. Reynolds and other University professors. At all times, all of the speakers at the rally referred to any demonstration in opposition to President Nixon's policies as nonviolent, peaceful and silent (B/E, 342). Signs had been silk-screened in some number which contained thereon the slogans, "Peace Now" and "Thou Shalt Not Kill". These small cardboard signs were distributed to a large number of the people at the rally.

Following the rally, the group walked to Neyland Stadium. Upon arriving at Neyland Stadium, there was considerable harassment by police and other security officials with re-

gard to the confiscation of the cardboard signs referred to above. Eventually, the rather amorphous group was permitted to enter Neyland Stadium and thereupon Dr. Reynolds and others were seated in a rather disorganized cluster in several sections on the east side of Neyland Stadium. In fact, there was really no organized method by which the group in question seated itself in Neyland Stadium. The group that had entered together was, in fact, separated into some five or six small clusters in the area mentioned. Dr. Reynolds entered Neyland Stadium and seated himself some time before the evening meeting even began on May 28, 1970. It is important to note that there were other faculty members other than Dr. Reynolds with the group as they entered and remained in Neyland Stadium.

It is important to note that Dr. Reynolds prior to entering the Billy Graham East Tennessee Crusade meeting on May 28, 1970, contemplated that it was to be a religious service. The demonstration that was contemplated by Dr. Reynolds and others was to be a silent and peaceful one, only when President Nixon spoke to the Crusade meeting. It was to be in the form of the holding up of signs and making the peace sign with one's fingers. However, it became apparent rather rapidly that the meeting on this particular evening was to be something more than a religious service. For example, the podium or platform contained only Republican politicians and did not contain any candidates or office holders who were Democrats. In addition, Dr. Graham's introduction of President Nixon was essentially a political statement without any religious content as the tape recording (Ex. 7, B/E, 84) introduced in evidence will clearly show to the Court. Dr. Graham's introduction with its political remarks clearly infuriated the assembled demonstrators and others who had contem-

plated that the meeting was to be a religious service. These political remarks precipitated chanting of the phrase "politics, politics". After Dr. Graham's introduction, President Nixon spoke to the people in the stadium which numbered approximately 75,000 with an additional 25,000 people outside the stadium. President Nixon's speech though containing certain religious references, was basically political in tone in that it contained the basic plea that the people support the President in his policies. During President Nixon's speech, there were additional chants such as "peace, now" and "stop the war". When all the proof is analyzed, it is rather clear that the chanting which occurred was rather spontaneous and without any clear organization or direction. There was some chanting of obscenities, but at no time did Dr. Reynolds engage in any such profane chants. During Dr. Graham's introduction of President Nixon, Dr. Reynolds did engage in the chant "politics, politics". During President Nixon's speech, Dr. Reynolds engaged in the chants, "stop the war" and "peace, now". In addition, Dr. Reynolds made the peace sign with his fingers (B/E, 350-351). Following President Nixon's speech, Dr. Reynolds and others left Neyland Stadium and at such time did so humming softly the song, "Give Peace a Chance". Several times during the meeting and prior to Dr. Reynolds leaving the stadium, he left his seat going to other areas in an effort to quiet certain members of the group. At no time during the entire evening was there any violence or acts of violence engaged in by any of the so-called members of the demonstration group (B/E, 354).

It was the opinion of Dr. Reynolds along with that of several others who testified during the trial, namely, Dr. Thomas Warren Ogletree, a professor in the Divinity School of Vanderbilt University, and a Methodist Minister,

and Dr. Lewis E. Rhodes, Minister of the Broadway Baptist Church in Knoxville, Tennessee, to name a few, that the portions of the meeting that evening which dealt with the introduction of President Nixon by Dr. Graham and the speech of President Nixon himself were essentially political and not religious (B/E, 284-286, 369, 450-451).

REASONS FOR GRANTING WRIT

The Supreme Court of Tennessee has decided a federal question of substance which has not specifically been heretofore determined by this Court and, in addition, has decided said federal question of substance in a way which is not in accord with the applicable decisions of this Court.

The petitioner, Charles Reynolds, was indicted on February 26, 1971, by the Grand Jury for Knox County, Tennessee, for a violation of Tennessee Code Annotated, Section 39-1204 (T/R, 3). The first count of said indictment provided as follows:

> The Grand Jurors for the State of Tennessee, upon their oaths, present that Charles Reynolds . . . heretofore, to wit: on the ____ day of May, 1970, in the State and County aforesaid, unlawfully and willfully did disturb and disquiet an assemblage of persons met for religious worship by noise, profane discourse, rude and indecent behavior; that is to say, that the said defendant did unlawfully and willfully disturb and disquiet an assemblage of persons met for religious worship at the Billy Graham East Tennessee Crusade by noise, profane discourse, and rude and indecent behavior in violation of Tennessee Code Annotated, Section 39-1204, contrary to the Statute andagainst peace and dignity of the State of Tennessee.

In response to said indictment, on September 30, 1971, counsel for the petitioner filed a motion to quash the indictment based in part on the grounds that the indictment and the statute relied upon as the basis therefor are unconstitutional and invalid and in violation of the Constitution of the State of Tennessee: Article I, Sections 9, 14, 19 and 23; and the Constitution of the United States: First, Fifth, Sixth and Fourteenth Amendments in that, (1) they are overbroad and, in addition, threaten freedoms protected by the First Amendment to the Constitution of the United States, and (2) are void for vagueness in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (T/R, 8).

Said motion to quash the indictment was duly argued on October 11, 1971 (T/R, 14-15), pursuant to which on October 13, 1971, the Court entered an order (T/R, 16-17) and issued a memorandum opinion from the Bench (B/E, 4-18) wherein the Trial Court overruled that portion of the motion to quash the indictment dealing with the first count of the indictment and deemed said statutory provision, Tennessee Code Annotated, Section 39-1204, to be constitutional.

The statute in question contains the following specific language:

> 39-1204. *Disturbing Religious, Educational, Literary or Temperance Assemblies - Penalty.*--If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other acts, at or near the place of meeting, he shall be fined not less than Twenty Dollars ($20.00) nor more

than Two Hundred Dollars ($200.00), and may also be imprisoned not exceeding six (6) months in the County Jail.

The foregoing statute, namely, Tennessee Code Annotated, Section 39-1204, is subject to attack on three basic constitutional grounds: (1) it is overbroad and threatens freedoms protected by the First Amendment to the Constitution of the United States; (2) it is void for vagueness in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; and (3) it violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In addition, said statutory provision offends the Sixth Amendment to the Constitution of the United States in that the accused has the right to be informed of the nature and cause of the accusation against him.

As can be seen from a cursory examination of the language in the statute, said statutory provisions have derivations from the ancient relics of the past. In fact, the legislative history indicates that the first version of the statute was in existence in the Code of 1858, and was subjected to certain revisions down through the years with the present version being enacted in 1932. The petitioner respectfully submits that the statutory provision in question was enacted by the General Assembly of the State of Tennessee in a manner and form which did not really consider in an adequate fashion the constitutional elements required of criminal legislation.

In this regard, we would like to present a brief statement made by Chief Justice Warren E. Burger in a recent address to the American Law Institute as follows:

Systems of justice are being attacked throughout the world. They reflect the uneasy temper of the times

that stir and shake the mind and spirit. This is an era we will not fully understand until it is over, but meanwhile we must cope with events, with a seeming weakening of some institutions and attacks on institutions. Of immediate relevance to us as lawyers is that gnawing doubt whether our system of justice, especially criminal justice, is sturdy enough to withstand the assaults which are leveled at it. Some say we must "crack down", that we must "smash" the challengers and restore tight discipline. In periods of stress there are always some voices raised urging that we suspend fundamental guarantees and take short cuts as a matter of self-protection. But this is not our way of doing things short of a great national emergency.

If we have the long view, we see that we have never been a tightly disciplined people and reflecting this, our legal structure has been more relaxed than that of many other societies. If this has negative aspects, it also gives us resiliency to tide us over and enable us to meet any crisis as it arises. We will respond slowly, but that is the nature of a democratic society. In those few periods of our history when we suspended basic guarantees of the individual in times of great national emergency, we often found, in retrospect, that we had overreacted.

The Supreme Court of the United States and other courts in this country have spoken clearly with regard to the constitutional requisites of legislation and in particular, criminal legislation. In *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), the United States Supreme Court established the vagueness doctrine with unmistakable force and clarity at 391:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are

> subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

This doctrine is still effective as evidenced by *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L.Ed. 2d 447 (1966), wherein the Court stated as follows at 402, 403:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Certain of the Courts in East Tennessee have also considered this question. In the recent case of *Smith v. University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969), the United States District Court for the Eastern District of Tennessee, while holding that certain regulations of the University of Tennessee were void for vagueness and overbreadth, stated as follows at 782:

> Stricter standards of vagueness apply where the statute potentially inhibits speech. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S. Ct. 275, 7 L.Ed. 2d 285. Regulations may not withstand constitutional scrutiny which are so broad that they treaten speech which is protected by the First Amendment. *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed. 2d 231.

Thus, where a statutory provision suffers from vagueness,

and has the further potential of inhibiting First Amendment freedoms, it also possesses the second constitutional infirmity, that of overbreadth. A statute is considered overbroad if it violates that principle "that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". *NAACP v. Alabama*, 377 U.S. 288 (1964), at 307.

In *Edwards v. South Carolina*, 372 U.S. 229, 9 L.Ed. 2d 697, 83 S.Ct. 680 (1963), the Court through Justice Stewart reversed the convictions of one hundred and eighty-seven black citizens who had been convicted in a magistrate's court in South Carolina of the common law crime of breach of the peace. The defendants in that case were arrested when they peacefully assembled at the site of the state government of South Carolina to protest "the laws which prohibited Negro privileges" in South Carolina. In reversing the convictions, the Court stated as follows in 9 L.Ed. 2d at 702-704:

> We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See *Cantwell v. Connecticut*, 310 U.S. 296, 307, 308, 84 L.Ed. 1213, 1219, 1220, 60 S. Ct. 900, 128 ALR 352; *Garner v. Louisiana*, 368 U.S. 157, 202, 7 L.Ed. 2d 207, 236, 82 S. Ct. 248 (concurring opinion.) These petitioners were convicted of an offense so generalized

as to be, in the words of the South Carolina Supreme Court not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the view of the majority of the community to attract a crowd and necessitate police protection.

The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U.S. 1, 4, 5, 93 L.Ed. 1131, 1134, 1135, 69 S. Ct. 894. As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand". Id. 337 U.S. at 5.

As Chief Justice Hughes wrote in *Stromberg v. California*, "The maintenance of the opportunity for free political

> discussion to the end that government may be responsible to the will of the people and that changes may be obtained by unlawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. . . ." 283 U.S. 359, 369, 75 L.Ed. 1117, 1123, 51 S. Ct. 532, 73 ALR 1484.
>
> For these reasons we conclude that these criminal convictions cannot stand.

In *Cox v. Louisiana*, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), the Court reviewed and considered a Louisiana statute pertaining to breach of the peace, which reads in part as follows:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and more . . . when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the State of Louisiana, or any other authorized person . . . shall be guilty of disturbing the peace. La. Rev. Stat. §14 103.1 (Cum. Supp. 1962).

In discussing the facts of this case and applying same to the foregoing statutory provision, the Court stated as follows at 13 L.Ed. 2d at 482, 483:

The statute at issue in this case, as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope. The statutory crime consists of two elements: (1) congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned," and (2) a refusal to move on after having been ordered to do so by a law enforcement officer. While the second part of this offense is narrow and specific, the first element is not. The Louisiana Supreme Court in this cause defined the term "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." 244 La. at 1105, 156 So. 2d, at 455. In Edwards, defendants had been convicted of a common-law crime similarly defined by the South Carolina Supreme Court. Both definitions would allow persons to be punished merely for peacefully expressing unpopular views . . . In Terminiello convictions were not allowed to stand because the trial judge charged that speech of the defendants could be punished as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." ID., 337 U.S. at 3, 93 L.Ed. at 1134. The Louisiana statute, as interpreted by the Louisiana court, is at least as likely to allow conviction for innocent speech as was the charge of the trial judge in Terminiello. Therefore, as in Terminiello and Edwards the conviction under this statute must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly. Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. As

> Chief Justice Hughes stated in *Stromberg v. California*, 283 U.S. 359, 369, 75 L.Ed. 1117, 1122, 51 S. Ct. 532, 73 ALR 1484: "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."
>
> For all these reasons we hold that appellant's freedoms of speech and assembly, secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment, were denied by his conviction for disturbing the peace. The conviction on this charge cannot stand.

Most recently these principles were discussed in *Kirkwood v. Ellington*, 298 F. Supp. 461 (1969), where a three judge court sitting in the Western District of Tennessee, Western Division, declared unconstitutional certain sections of the Tennessee vagrancy statute. In so doing the court stated as follows at 465, 466:

> First, the Court finds that subsection (1) of the Tennessee vagrancy statute is unconstitutionally vague.
>
> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L.Ed. 322 (1926).
>
> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L.Ed. 888 (1939).

See also *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 403, 86 S. Ct. 518, 15 L.Ed. 2d 447 (1966) and *Baker v. Bindner*, supra, and *Roberts v. Clement*, 252 F. Supp. 835 (E.D. Tenn., 1966).

Legislation of the type that employs ambiguous phrases such as *apparent means of subsistence* and *honest calling*, "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176 (1965).

The vagueness of subsection (1) of T.C.A. § 39-4701 becomes even more evident when one examines the testimony given by the arresting officers and other officers who were on duty in the area in which these arrests were made. The officers gave different definitions of *apparent means of subsistence* and *honest calling*. A penal law which creates such a diversity of opinion on the part of those charged with its enforcement is unconstitutional. As was stated by the Court of Appeals for the District of Columbia, "'Vague laws in any area suffer a constitutional infirmity,' and what the Constitution demands of other laws it exacts imperatively of those who undertake to punish vagrancy." *Ricks v. District of Columbia*, supra, quoting *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S. Ct. 1407, 1410, 16 L. Ed. 2d 469 (1966).

In addition to the lack of clarity and precision and therefore the vagueness of subsection (1) of T.C.A. § 39-4701, it is overbroad and thus infringes on constitutionally protected rights. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of

protected freedoms . . .'". *Cameron v. Johnson*, *supra*, 390 U.S. at 617, 88 S. Ct. at 1338, 20 L. Ed. 2d 182 quoting *Zwickler v. Koota*, 389 U.S. 241, 250, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967); see also *Keyishian v. Board of Regents*, 385 U.S. 589, 609, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 508-509, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The fact that the motive or purpose of the vagrancy statute is to prevent another and separate crime of prostitution does not justify the possible inclusion of those persons not on the street for criminal purposes.

In the recent case of *Coates v. Cincinnati*, 402 U.S. 611 (1971), this Court considered a municipal ordinance which presented a constitutional question almost precisely that presented in the case at bar. The ordinance in question made it a criminal offense for "Three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." In holding this ordinance unconstitutional, this Court, through Justice Stewart, stated as follows at 613, 614, 615 and 616:

> Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that "*the standard of conduct which it specifies is not dependent upon each complainant's sensitivity*." Ibid. *But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.* [Footnote omitted.]

[1] We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. *In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.*

[2] *Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."* Connally v. General Construction Co., 269 US 385, 391, 70 L Ed 322, 328, 46 S Ct 126.

[3] It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. Gregory v Chicago, 394 US 111, 118, 124-125, 22 L Ed 2d 134, 139, 143, 89 S Ct 946 (Black, J., concurring). It cannot constitutionally do so through the enactment and enforcement of an ordinance whose

violation may entirely depend upon whether or not a policeman is annoyed. [Footnote omitted.]

[402 US 615]

[4] But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. See Street v New York, 394 US 576, 592, 22 L Ed 2d 572, 585, 89 S Ct 1354; Cox v Louisiana, 379 US 536, 551-553, 13 L Ed 2d 471, 482, 483, 85 S Ct 453; Edwards v South Carolina, 372 US 229, 238, 9 L Ed 2d 697, 703, 83 S Ct 680; Terminiello v. Chicago, 337 US 1, 93 L Ed 1131, 69 S Ct 894; Cantwell v Connecticut, 310 US 296, 311, 84 L Ed 1213, 1221, 60 S Ct 900, 128 ALR 1352; Schneider v. State, 308 US 147, 161, 84 L Ed 155, 164, 60 S Ct 146. *The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people.* If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. [Footnote omitted]

[402 US 616]

And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens. [Footnote omitted]

> *The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution.* We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinace than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.
>
> The judgment is reversed. [Emphasis added.]

We also refer the Court to *Cohen v. California*, 403 U.S. 15 (1971), and *Gooding v. Wilson*, 405 U.S. 518 (1972).

The Courts in Tennessee have considered on several occasions the statutory provision in question. However, these particular decisions have not, in reality, adequately dealt with an analysis of the constitutional aspects of said statutory provision. Most of the cases involved are decisions from the late 1800's. There are two fairly recent decisions which have considered this statutory provision. In *Ford v. State*, 210 Tenn. 105, 355 S.W.2d 102 (1962), the defendants raised the question that their constitutional rights were being violated by the conviction in question because the place where the incident in question occurred was a publicly owned facility and they could not be excluded from same. See 355 S.W.2d at page 105. This, however, is the only suggestion of any constitutional question, and the Court did not engage in any manner in an analysis of the constitutionality of said statutory provision. In *State v. Morris*, 236 F. Supp. 780 (1965), a case growing out of the same set of facts as *Ford v. State*, *supra*, the Court dealt with a discussion of the equal

protection clause and the due process clause as same were applied to the convictions of the defendants. The key issue in this regard was whether or not the defendants, who were Negroes, had the right to attend the meeting or assembly in question in Memphis. The Court concluded that such was the case, but at the same time concluded that such elements were not involved in the convictions of these defendants. Moreover, the Court did not in any fashion whatsoever discuss the precise question of constitutionality as it related to the statutory provision in question.

Applying the concepts of vagueness and overbroadness as developed by the foregoing authorities, petitioner respectfully submits that Section 39-1204 is defective when considered with a constitutional microscope. Considering the language of the statute, the first elements of same refer to the concept of *disturb* or *disquiet*. What does this really mean? When we use the word *disturb*, to what are we really referring? In addition, what standard are we applying? Are we referring to disturbing the entire assemblage of persons or is the mere fact that one person in attendance is disturbed sufficient? There is no real standard or guideline to indicate what we mean by the use of the concept *disturb*. For example, if an individual stood up during the meeting in question and merely held up his fingers indicating the peace sign or held a sign saying "Thou shalt not kill", and such offended or upset an individual or individuals in attendance, would this justify a conviction under the statute? We submit that such would not properly justify a conviction. In addition, the two acts above referred to would be constitutionally protected activity under the First Amendment to the Constitution of the United States. Secondly, what do we mean by the concept disquiet? Again, there is no standard or

guideline to be employed. Accordingly, we submit that the use of the concepts disturb or disquiet are in reality defective because of vagueness and overbroadness.

Further, what do we mean by the use of the concept "assemblage of persons met for religious worship"? Is it not possible for an assemblage to have more than one purpose or to change its purpose or function during the meeting or period in question? The proof will show that in this case, that portion of the meeting dealing with the introduction of President Nixon by Dr. Graham and President Nixon's speech itself were indeed political rather than religious. In addition, it seems rather apparent that a large portion of the people in attendance on May 28, 1970, were there for the primary purpose of seeing President Nixon rather than participating in a religious service. In support of this, the proof clearly shows that on all other evenings or occasions when the Crusade met there were not in excess of 30,000 to 50,000 people. However, on the evening of May 28, 1970, there were approximately 75,000 people inside the stadium with an additional 25,000 people outside the stadium. When looking at this concept, we submit that same is defective for vagueness.

The third section of the statute deals with the elements *noise, profane discourse, rude or indecent behavior.* The use of the word noise would at first blush appear to be clear, but what type of noise are we referring to? The proof shows that practically the entire period of the meeting dealing with President Nixon's speech and Dr. Graham's introduction of President Nixon there was considerable noise both in approval of the statements being made by the two speakers and in opposition to the two speakers. It would seem that the only activity such as noise to be prosecuted under the language of this statute would be that which expressed disapproval of the policies of President Nixon and political statements made by Dr. Graham.

Would the chants "politics, politics" and "stop the war" or "peace, now" be such that would justify a conviction under the statute in question. We think clearly not, and such clearly shows that the foregoing concept is vague and overbroad. In addition, there is no clear reference as to what the statute means by the use of the phrase "rude or indecent behavior". We respectfully submit that same is grossly vague and overbroad and a further reason for the statutory provision to be considered defective.

The last element of the statutory provision in question refers to "or any other act". This is without discussion clearly vague and overbroad and makes the entire statutory provision defective and unconstitutional. First, there is no clear definition as to what is meant by any other act. Secondly, it is clear that the phrase in question includes and covers activity which is constitutionally protected under the freedom of speech portion of the Constitution of the United States.

SUMMARY

In summary, the petitioner submits that only one conclusion can follow from an analysis of this statutory provision, namely, that it is vague and overbroad and violates the constitutional prerequisites of valid criminal legislation.

In addition, the statutory provision in question was unconstitutionally applied to this appellant. There is no substantial dispute as to the type of activity engaged in by Dr. Reynolds during the meeting in Neyland Stadium on May 28, 1970. Dr. Reynolds stood on certain occasions and gave the peace sign with his fingers. In addition, Dr. Reynolds testified that during the introduction of President Nixon by Dr. Graham and President Nixon's speech, he engaged in the chants "politics, politics" and "stop the war". Officer Don Hall of the University of Tennessee Safety & Security (B/E, 136) testified that in addition Dr. Reynolds engaged in the chants "peace, now" and "end the war". It is clear from all the proof that at no time did Dr. Reynolds engage in any obscenities. In addition, it is clear that at no time did Dr. Reynolds or anyone else engage in any act or acts of violence. Further, the proof is rather clear that the chants engaged in by Dr. Reynolds and others were spontaneous and without direction and occurred in reaction to the political statements of Dr. Graham and President Nixon. At the same time that these chants were being expressed, the general crowd noise in the stadium was rather loud both in expressing approval and disapproval of the statements and comments from the podium. It is true that Dr. Reynolds did participate in some of the chanting with respect to the demonstration that occurred during the meeting on this particular evening. However, all of the plans were directed to the response being non-violent, *silent* and peaceful. Such was the intent of everyone involved. The feeling and response

of Dr. Reynolds and others changed only in a spontaneous response to the political remarks of Dr. Graham and President Nixon and were not in any manner planned or intended willfully. Dr. Reynolds participated in the planning in an effort to avoid and prevent violence or acts of violence. In this regard, he was successful. Dr. Reynolds believed that he was going to attend a religious service on the evening of May 28, 1970. However, when it became apparent that a portion of the meeting was intended as political, the mood of the entire group changed spontaneously and without any specific direction. It is also interesting to note that at the conclusion of President Nixon's speech, Dr. Reynolds and others left Neyland Stadium and in a quiet tone hummed "Give Peace a Chance".

First of all, it appears clear from an analysis of the behavior of Dr. Reynolds that his actions were not calculated to willfully disturb or disrupt the meeting in question. His actions were a spontaneous response to what were, in essence, political remarks of Dr. Graham and President Nixon. In addition, the proof clearly shows from the testimony of a number of experts previously referred to, such as Dr. Ogletree and Dr. Rhodes, in addition to others, that the portions of the meeting on that evening dealing with the introduction of President Nixon by Dr. Graham and the speech of President Nixon were essentially political and not religious. Accordingly, while certain portions of the meeting that evening may have been religious in nature, it is submitted that the introduction of President Nixon by Dr. Graham and the speech of President Nixon constituted the meeting as assemblage of persons met for political purposes rather than religious purposes. Therefore, we have an assemblage of persons which, in reality, had two purposes, one religious, and the other political. It would be rather ridiculous to say

that a meeting such as this in the context in which it occurred was an assemblage of persons met for only one purpose, namely, religious. It would appear obvious that it also had the overtones of a political meeting and that a large number of the people were there for such a purpose, to see the President of the United States, a political individual. For example, on all other meetings of the Billy Graham East Tennessee Crusade, the attendance was not in excess of 50,000 people. However, on the evening when President Nixon appeared, there was 75,000 people inside the stadium and 25,000 outside the stadium. In addition, there were only Republican politicians on the podium and no Democratic candidates or politicians. Suffice it to say, the petitioner submits that the portion of the meeting during which Dr. Reynolds engaged in any activity such as chanting, was in reality an assemblage of persons met for political purposes rather than religious worship. Thirdly, the petitioner submits that he did not in any manner whatsoever disturb or disquiet any such assemblage. How could anyone say that his activity did disturb or disquiet any particular individual or individuals present. There is no proof in the record in this regard. In addition, as heretofore stated, there is no criteria or standard set forth to indicate what we even mean by the concepts of disturb or disquiet. Fourthly, it is first of all clear that the petitioner, Dr. Reynolds, in no manner engaged in any profane discourse or rude and indecent behavior. Such is obviously not the case in the context of the situation that occurred that evening. With reference to noise, Dr. Reynolds did engage in certain chanting, but it is respectfully submitted that at the time he was so engaged there was a great deal of noise from all sections of the stadium both in approval and disapproval of the statements being expressed by Dr. Graham and President Nixon from the podium. This clearly illus-

trates the confusion presented as to what we mean by the concept noise. Are we not, in reality, subjecting Dr. Reynolds to prosecution in this case for expressing convictions, which, by the way, he feels very strongly, which may be in opposition to those of a politician, President Nixon. Such being the case, assuming the statute is constitutional, which is denied, same was unconstitutionally applied to Dr. Reynolds.

Although same are not within the scope of the proof in this cause, the references in the statutory provision to assemblages for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance further point up the defective nature of these provisions when the constitutional standard of vagueness and overbreadth are applied.

The Court of Criminal Appeals and the Supreme Court of Tennessee found the statute constitutional but in so doing only considered generalities and did not really analyze the constitutional concepts involved. In so holding the two Tennessee appellate courts ignored the basic holdings of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

W. P. BOONE DOUGHERTY
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Knoxville, Tennessee 37902

BERNSTEIN, DOUGHERTY & SUSANO
Of Counsel

Date: October 5, 1973

AFFIDAVIT OF SERVICE

I, W. P. Boone Dougherty, Counsel for the Petitioner, being first duly sworn according to law, depose and say:

I have this ..... day of October, 1973, served a true and exact copy of the foregoing petition for a writ of certiorari upon W. Henry Haile, Assistant Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tennessee 37219, by depositing same in the United States Post Office or mail box, with first class postage prepaid, addressed to said counsel at his address.

.....
W. P. BOONE DOUGHERTY

Sworn to and subscribed before me
this ..... day of October, 1973.

.....
Notary Public

My Commission Expires:.....

Appendix

A. 1

Opinion

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE

APRIL SESSION, 1972

CHARLES REYNOLDS,
Plaintiff in Error

v.

STATE OF TENNESSEE
Defendant in Error

NO. 175
Knox County
Honorable Joe D. Duncan, Judge
(Disturbing a Religious Assembly)

For Plaintiff in Error:
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Ralph Harwell &
Edward E. Wilson
Assistant District Attorneys
General
Knoxville, Tennessee

OPINION FILED:_____

AFFIRMED

Robert K. Dwyer
Judge

[fol. 1]

OPINION

(Filed September 11, 1972)

The defendant Dr. Charles Reynolds was convicted by a jury for committing the offense of disturbing a religious assembly. See T.C.A. 39-1204. From a judgment imposed on the twenty-dollar fine set by the jury this appeal has been seasonably perfected.

From excellent briefs filed by the defendant and the State we have undertaken to resolve the very interesting questions found in this record.

This four-day trial was the aftermath of events which occurred during the religious crusade of Dr. Billy Graham at Neyland Stadium in the City of Knoxville on May 28, 1970.

The defendant at the time of the event was an Assistant Professor employed by the University of Tennessee in the Religion Department. He is an ordained Methodist minister.

There is a constitutional attack directed at the validity of the statute premised on the assertions that it is overbroad and vague. Other assignments of error have been made and will be dealt with after our review of the facts found in this record.

The Billy Graham Rally for Christ had been in progress nightly for about a week preceding the Friday night of this occurrence. There was conceded much advertising that President Richard Nixon was to be presented to

[fol. 2] the assembly on that evening. There were about 75,000 persons assembled in the stadium, and an additional 25,000 immediately outside the stadium.

The defendant was aware that a demonstration at this appearance was being planned. He attended meetings with members of the University of Tennessee faculty and student government, as he related, to make and keep the demonstration silent, peaceful and orderly. At one of the meetings one of the non-appealing co-defendants made known to the defendant and others that his protest would not be silent.

Both parties concede that Dr. Graham's rallies are religious in their substance. But the parties differ as to whether the assembly diverted during the Friday meeting from a primarily religious function into a political assembly for political purposes.

On the evening of the rally the defendant and the group of protesters, some several hundred, marched to the stadium. The early portions of the rally included singing by the choir, during which there were interruptions by chants from the protest group. These chants or later chants included, among others, "One, two, three, four, we don't want your fucking war", and "Bullshit", stated repeatedly for brief periods.

At one point during the meeting another non-appealing defendant yelled "Fuck you" at one of the ministers while the latter was leading the assemblage in prayer from the podium.

[fol. 3] There is a conflict of testimony as to whether all the chanting and obscenities took place during the introduction by Dr. Graham of the President and during the President's speech. Prosecution witnesses related the chants and obscenities occurred during some of the choir singing and other religious portions of the meeting, and defense witnesses related that they did not.

The jury has decided this conflict and we see no reason to disturb their finding. See *Holt v. State*, 210 Tenn. 188, 197, 357 S.W.2d 57.

It is apparent that two of the greatest guarantees of our Constitution, though they are parallel, essentially collide in this record: freedom of speech and freedom of worship. Deprivations of these two basic freedoms, along with taxation abuses, were primarily responsible for the birth of this country. We feel that the twain, religion and politics, should never meet. However, in this record we are satisfied that there was a religious assembly permeated with political overtones by the appearance of the President, even though his speech was to a large extent spiritual in its content. On the other hand, we are satisfied that the sizeable majority of those in attendance at the meeting were there for the religious revival that had been under way all week prior to the eventful night. We note that the group of protesters in the stadium represented less than one percent of the 75,000 assembled in the stadium for the meeting, not to mention the 25,000 others immediately outside the stadium. The rights of these individuals in this large gathering to assemble and worship undisturbed should not be minimized in the consideration of the conflicting rights involved herein.

[fol. 4]

The defendant contends the evidence is insufficient to support the verdict. He reasons that his only participation was to urge that the demonstration be peaceful, that there was no specific intent on his part to disturb the assembly, and that he did not personally participate in the prohibited acts. We are satisfied that the defendant did not chant obscenities and that his intent was for a peaceful demonstration. Yet, he admits to protesting

the appearance of the President, and he admits to participating in the organizing of the protest. The acts of the group under these conditions bring this defendant within the ambit of being an aider and abettor. See T.C.A. 39-109. Thus, we hold that the obscenities from the group and the chanting by the group, which occurred at the assembly during its various religious and non-religious portions, are also his acts by his participation in the group. He cannot escape responsibility for his participation in planning the demonstration by relating he personally himself did not do the unlawful acts, which arose during the event. We find the evidence supports the verdict. Defendant has not carried the burden here to show that the evidence preponderates against the verdict. See *Pique v. State*, ___ Tenn.Crim.App.___, 480 S.W.2d 546, 549. The assignment is overruled.

We now turn our attention to the fundamental issue presented in this record, the constitutionality of
[fol. 5] the statute. We first note that since 1801 our statutes have made punishable the disturbance of a religious assembly. Such longevity bespeaks perhaps of anachronism, but we feel it also bespeaks of a vitality to withstand constitutional attacks, which vitality is grounded on the fundamental importance of the freedom the statute seeks to protect.

Defendant reasons first that the statute is overbroad, in violation of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and of Article 1, Sec. 9, 19 and 23 of the Tennessee Constitution.

A history of the statute may be found in *Ford v. State*, 210 Tenn. 105, 110-112, 355 S.W.2d 102. The statute should be liberally construed because its purpose is to protect citizens in their right to worship God undisturbed.

See *Hollingsworth v. State*, 37 Tenn. 518. Further, the statute should be construed to be constitutional whenever possible. See *United States v. Vuitch*, (1971), 402 U.S. 62, 91 S. Ct. 1294, 1298. The statute would be overbroad if it unjustifiably sweeps within its ambit protected freedoms, including, as here, freedom of speech. See *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 252, and *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 84 S. Ct. 1302, 1314.

We hold that the statute is not overbroad. Under the First Amendment the freedom of speech is broadly protected, but it does not follow that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. See *Cox v. Louisiana*, [fol. 6] 379 U.S. 536, 85 S. Ct. 453, 464, and *Adderly v. Florida*, 385 U.S. 39, 87 S. Ct. 242. This statute does not stifle the freedom of speech and advocacy, except where another freedom predominates at the time and place. It has a legitimate purpose in the protection of the freedom of worship.

The defendant also urges that the statute is unconstitutionally vague. It is vague if it leaves the public uncertain as to the conduct it prohibits, or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 520, 521. In order to avoid vagueness the minimum requirement is therefore fair notice that certain conduct is proscribed. See *Rabe v. Washington*, ___ U.S. ___, ___ S. Ct. ___, decided March 20, 1972. An accused cannot be held criminally responsible for conduct which he could not reasonably understand to be proscribed. See *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812. In *Colten v. Kentucky*, ___U.S.

___, ___ S. Ct. ___, decided June 12, 1972, the following language may be found:

> ". . . The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: 'We believe that citizens who desire to obey the statute will have no difficulty in understanding it. . . .' *Colten v. Commonwealth*, 467 S.W.2d 374, 378 (Ky. 1971)."

[fol. 7] Even though a different type of statute was under consideration in *Colten v. Kentucky*, supra, the principle is applicable here. In the solemnity of worshipping God according to the dictates of their own consciences, citizens desiring to obey the statute would have no difficulty in understanding that they should not disturb nor disquiet the assembly by noise, profane discourse, rude or indecent behavior, or any other act. We think this language is fair notice of what is prohibited at a religious assembly. See *Grayned v. City of Rockford*, ___ U.S. ___, ___ S. Ct. ___, decided June 26, 1972. The statute is not unconstitutionally overbroad or vague. The assignments pertaining thereto are overruled.

Defendant also contends the trial court erred in overruling his motion for a directed verdict at the conclusion of the State's proof and at the conclusion of all the proof. Since we have found there is a sufficiency of the evidence to sustain the verdict, we conclude the trial court properly overruled these motions. There was a sufficiency of facts in the proof for a jury's determination of whether

the statute was violated. See *Ridley v. Spence*, ___ Tenn. App. ___, 456 S.W.2d 846, 848. The assignment is overruled.

Defendant next contends the court erred in allowing testimony from State's witnesses to the effect that in their opinion the revival was a religious assembly. The record is replete with testimony from both sides as to opinions of whether this was a religious or a political as-

[fol. 8] sembly. We find no merit in this contention. The assignment is overruled.

Defendant assigns error to the trial court's overruling his motion to quash the indictment and his motion to quash the jury panel. He asserts no one under twenty-one and over eighteen years of age was on the grand jury or on the petit jury panel. He abandons the motion relating to the grand jury because the act, T.C.A. 1-313 as amended, allowing eighteen year olds to be eligible for jury service, was not effective until some five months after the indictment had been returned. The trial court in overruling the motion as to the petit jury panel found that the venire had been composed prior to the effective date of the act. We find no systematic exclusion here that has denied the defendant a fair trial. He is not entitled by right to have eighteen-to-twenty-one year olds in the jury box. It is only the purposeful and systematic exclusion of a group which is condemned. No showing of such an exclusion was made by the defendant here. The assignment is overruled.

Next the defendant contends that the court erred in the following instructions to the jury:

"The gravamen of the offense is the indulgence of improper conduct and the attracting of the attention of any part of the assembly thereby and when these facts concur the offense is complete."

"It is not necessary that the whole congregation or any part of it, engaged in religious exercises should be interrupted, it is sufficient if one member of the congregation should be interrupted while so engaged."

[fol. 9] Defendant argues these portions of the charge to the jury go beyond the intent of the statute, are vague and overbroad, do not communicate the nature of the offense, and inhibit constitutionally protected freedom of speech.

These contentions have been settled by our Supreme Court when it approved an identical charge in *Holt v. State*, 60 Tenn. 192, 194. The Attorney General acknowledges that the phrase "indulgence of improper conduct", when read out of context, is persuasive toward vagueness. But, he then reasons that when the entire charge is viewed as given it clearly reflects that the court went to great lengths to instruct the jury that only such conduct as was deliberately calculated to disturb those gathered for worship constituted a violation of the statute. We agree with this overview of the total charge.

Defendant then contends that the court's instructions were defective in that they protected a congregation from being disturbed not only while actually engaged in worship but also while merely assembled for the purpose of worshipping. He reasons the instructions extend the statute beyond its import so as to protect activities not considered religious. We think the statute protects the assemblage from the time it assembles for worship until it disperses and ceases to be a congregation. See *Williams v. State*, 35 Tenn. 313, 315, and *Hollingsworth v. State*, supra, at 520. This unbriefed assignment is overruled.

Defendant's last assignment is that the court erred in denying two tendered special requests for charges to the jury. The first was:

[fol. 10] "The statute above quoted not only protects from disturbing a congregation while actually engaged in worship, but extends its protection also to all congregations which have assembled for the purpose of worship; and this protection continues from the time the congregation so assembles until it disburses and ceases to be a congregation or until it becomes a meeting for some purpose other than religious worship."

The request collides with the interpretations of the statute by our Supreme Court in *Williams v. State*, supra, and *Hollingsworth v. State*, supra, which opinions teach that its protection extends until the congregation disperses.

The second requested charge was:

"If an assembly of persons initially met for religious worship subsequently becomes a meeting or assemblage for some purpose other than religious worship, then the assemblage is not entitled to the protection of this statute during the time that is met for some purpose other than religious worship."

This also is not the law. See *Williams v. State*, supra, and *Hollingsworth v. State*, supra. The court therefore did not err in denying the requests. The assignment is overruled.

The judgment of the trial court is affirmed.

/s/ Robert K. Dwyer
Robert K. Dwyer, Judge

Concur:

/s/ W. Wayne Oliver - Concur in result.
W. Wayne Oliver, Judge

/s/ Charles H. O'Brien
Charles H. O'Brien, Judge

COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

[fol. 1]

CHARLES REYNOLDS	No. 175 Knox County
vs.	Offense Disturbing a Religious Assembly
STATE OF TENNESSEE	AFFIRMED

JUDGMENT

(Filed September 11, 1972)

Came the plaintiff in error, Charles Reynolds, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

Judgment

It is, therefore, ordered and adjudged by the Court that the State of Tennessee recover of Charles Reynolds, the plaintiff in error, for the use of the County of Knox, the sum of $20.00, the fine assessed against him in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Sheriff by the Clerk of the Court below.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $500.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

/s/ W. Wayne Oliver

Robert K. Dwyer

Charles H. O'Brien

[fol. 1]

CHARLES REYNOLDS,
Petitioner,

VS.

STATE OF TENNESSEE,
Respondent,
Cross-Petitioner.

KNOX CRIMINAL

HONORABLE JOE D. DUNCAN,
Judge.

For Petitioner:
W. P. Boone Dougherty,
of Bernstein, Dougherty
and Susano,
Knoxville, Tennessee.

For Respondent:
David M. Pack,
Attorney General

W. Henry Haile,
Assistant Attorney General,
Nashville, Tennessee.

Ralph Harwell & Edward E.
Wilson, Assistant District
Attorneys General,
Knoxville, Tennessee.

PER CURIAM OPINION AND ORDER

(Filed July 16, 1973)

Petitioner Dr. Charles Reynolds, was convicted for disturbing a religious assembly in violation of §39-1204 T.C.A. and fined $20.00. The Court of Criminal Appeals affirmed, holding that while Dr. Reynolds did not personally participate in certain of the prohibited acts, his actions made him an aider and abettor under §29-109 T.C.A. We granted certiorari to consider whether or not this holding, which is contrary to the rule that there are no aiders and abettors in misdemeanor violations,

grew out of the absence of evidence of primary guilt or the preponderance of the evidence against the verdict.

[fol. 2] Both petitioner and the State have saved their respective positions by assignments of error, which are in substance the same errors assigned in the Court of Criminal Appeals.

We are satisfied after hearing argument on this case and after full consideration that the opinion of the Court of Appeals is correct; except for its conclusion that Dr. Reynolds was guilty as an aider and abettor. As to this, the overwhelming preponderance of the proof is that Dr. Reynolds did violate the statute, purposefully, directing his protest, according to his own testimony, to the meeting in its religious aspects.

More than this, the conduct of Dr. Reynolds cited by the Court of Criminal Appeals as amounting to aiding and abetting, actually makes Dr. Reynolds guilty as a principal offender, Webster v. State, 110 Tenn. 49, 282 S.W. 179 (1903); Truss v. State, 81 Tenn. 311 (1884).

The writ of certiorari is discharged and the case is remanded to the Court of Criminal Appeals for the carrying out of its judgment.

PER CURIAM.

A. 15

Decree

SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SEPTEMBER TERM 1972

[fol. 1]

DECREE

(Filed July 16, 1973)

Charles Reynolds	Knox Criminal
vs. (No. 5203)	Writ of Certiorari Discharged and Remanded to Court of Criminal Appeals.
State of Tennessee	

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for certiorari should be discharged and the case remanded to the Court of Criminal Appeals.

It is therefore ordered and adjudged by the Court that the petition for certiorari is discharged and the cause remanded to the Court of Criminal Appeals for the carrying out of its judgment.

Costs of the cause in this Court will be paid by Charles Reynolds, for which let execution issue.